SOCOIL CORP. BHD.

v.

GAYA FATS & OILS SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 3474 OF 1983]
5 JULY 1985

CIVIL PROCEDURE: *Order 14 application - Defendants failed to deliver goods they had contracted to deliver to plaintiffs - Damages - Whether plaintiffs entitled to summary judgment.*

This is an appeal by the plaintiffs from the dismissal by the Senior Assistant Registrar of their O. 14 application. The defendants had failed to deliver goods they had contracted to deliver to the plaintiffs. A term of the contract provided for a right to rescind or claim for damages on failure to deliver or purchase. The plaintiffs opted not to cancel the contract but to purchase the goods elsewhere. The affidavit by the plaintiffs failed to disclose the actual price paid and the defendants queried as to what was meant by the market price for the goods.

Held:

[1] The purpose of O. 14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried.

[2] The contention of the defendants is a fairly arguable point and ought to be tried.

[3] Accordingly, the plaintiffs were not entitled to summary judgment.

[Appeal dismissed with costs.]

Case referred to:
Anglo-Italian Bank v. Wells 8 LT 201 CA

Other Source referred to:
Supreme Court Practice (1982), Vol. 1, para. 14/3-4/2

For the plaintiffs/appellants - H.K. Choong; M/s. Chooi & Co.
For the defendants/respondents - Uma Ratnasingam; M/s. Sothi & Ang

JUDGMENT

VC George J:

This is an appeal by the plaintiffs from the dismissal by the Senior Assistant Registrar of their O. 14 application.

The defendants had failed to deliver the 1000 metric tons (MT) refined bleached deordorised palm olein (RBDPolein) they had contracted to deliver to the plaintiffs. The agreed price (contract price) for the RBDPolein was RM1,426.39 per MT. Clause 10 of the written contract between the parties is as follows:

10. Default

> In default of fulfillment of this contract by either party, the other party at his discretion shall, within 48 hours, after giving notice in writing, or by cable, telegram, or telex, if they do not reside in the same town, have the right either to cancel the contract, or the right to sell or purchase, as the case may be, against the defaulter who shall on demand make good the

> loss, if any, on such sale or purchase. If the party liable to pay, shall be dissatisfied with the price of such sale or purchase, or if neither of the above right is exercised, the damages if any, shall, failing amicable settlement, be determined by arbitration. The damages awarded against the defaulter shall be limited to the difference between the contract price and the market price on the day of default but if the arbitrators consider the circumstances of the default justify it, they may, at their absolute discretion, award additional damages. Damages to be computed on the specific contract quantity.

By para. 5 of the statement of claim, the plaintiffs contended that, as by reason of the default on the part of the defendants in delivering the palm olein "the plaintiffs were compelled to purchase the said 1000 MT RBDPolein from the open market at the price of RM1,625,000 calculated at RM1,625 per metric ton", and the defendants became liable to pay to the plaintiffs the sum of RM198,610 being the difference between the market price and the contract price of the said 1000 MT RBDPolein. The plaintiffs opted, as they were allowed to do by Clause 10, not to cancel the contract but to purchase the 1000 MT elsewhere.

In the affidavit in support of the O. 14 application, one Ong Chan Hwa who apparently is an officer of the plaintiff company with knowledge of the relevant facts stated at para. 7,

> As a result of the defendant's failure, refusal and/or neglect to deliver, the plaintiff suffered damages amounting to RM198,610 being the difference between the market price on 10 November 1983, the extended date of delivery and the contract price. The market price for Refined Bleached Deodorised Palm Olein was RM1,625 per metric tonne according to the rates given by the Palm Oil Refiners Association (PORAM). A copy of the PORAM's rates for trade done on 10 November 1983 is annexed herewith and marked as exhibit 'OCH-4'.

For the defendants it was contended that since the plaintiffs had chosen to and purchased the RBDPolein in the open market, by the said Clause 10 of the contract the plaintiffs were only entitled to the difference (if any) between the contract price and the actual price paid by the plaintiffs. They argued that the actual price paid, if paid, need not necessarily be the so-called market price. It was pointed out that neither in the statement of claim nor in the affidavit in support of the O. 14 application have the plaintiffs stated the actual price paid. It would appear that, in the construction given to the said Clause 10 by the defendants, there must have been an actual purchase and the actual purchase price paid has to be disclosed for there to be a complete cause of action.

The purpose of O. 14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried (see *The Supreme Court Practice* (1982) Vol. 1, para. 14/3-4/2). Jessel M.R. said in *Anglo-Italian Bank v. Wells* 38 LT p. 201 CA:

> When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff.

The contention of the defendants is a "fairly arguable point". It clearly raises an issue which ought to be tried. If the construction they give to Clause 10 is the correct construction the plaintiffs' claim could even be dismissed for want of a complete cause of action.

Accordingly, the plaintiffs were not entitled to summary judgment. The Senior Assistant Registrar was justified in dismissing the O. 14 application. The appeal is dismissed with costs.

Also found at [1985] 2 CLJ 280